Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996) CC Docket No. 96-98

AT&T REPLY TO OPPOSITIONS AND COMMENTS TO PETITIONS FOR RECONSIDERATION AND CLARIFICATION OF FIRST REPORT AND ORDER

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SUMMARY

AT&T's Petition proposed clarifications to the Commission's pricing rules to help ensure that incumbents assess new entrants the true economic cost of access to their unbundled network elements and to help prevent incumbents from imposing discriminatory charges that operate as entry barriers. Incumbent LECs predictably oppose these measures, but raise no legitimate objection to AT&T's TELRIC-based, competitively neutral proposals. Instead, they offer only new variations of their tired claim that they alone must be guaranteed recovery of whatever "actual" historical costs they happen to incur for whatever networks they choose to build. As the Commission, the Department of Justice and others have recognized, that view is fundamentally incompatible with the competitive goals of the Act.

The incumbents also contend that the pending appeals and temporary stay divest the Commission of jurisdiction to revisit its pricing rules. The Supreme Court has held, however, that the pendency of such appeals has no effect on the Commission's authority to refine its rules or even to develop alternative legal justifications for them. Moreover, it is critical that the Commission do so here, because the incumbents have made it patently clear they will, if allowed, use "nonrecurring" and other charges to erect insurmountable barriers to entry and competition.

The incumbents' more general claims that the Commission lacks any authority to adopt (or refine) TELRIC-based pricing guidelines similarly lack merit. Quite apart from the provisions of § 251, there are at least two other jurisdictional bases for these rules - each of which is legally unassailable. Moreover, the arbitration decisions issued to date demonstrate that, even while stayed, the Commission's pricing rules have been, and will continue to be, highly influential in the state proceedings that will ultimately determine whether incumbents

succeed in their efforts to protect their monopolies. The Commission has both authority and good cause to complete what it began and to develop the national pricing guidelines that will promote efficient competition while preserving state authority to determine specific prices.

The Commission also should require incumbents to permit CLECs to place remote switch modules or optical switch modules ("collectively "RSMs") in collocated space. In the intended configuration, RSMs function as transmission equipment, and allowing RSMs in collocated space will permit greater efficiencies. Incumbents should also be required to make dark fiber available to competitive carriers because, except for electronics, dark fiber is identical to other ILEC optical transmission facilities used to provide transport and loop functions. Indeed, the effect of a decision not to require access to fiber without electronics (i.e., dark fiber) is to impose the kind of bundling requirement that Section 251(c)(3) was intended to eliminate.

Finally, the Commission should require incumbents to make short-term promotional offerings available for resale. The First Report and Order makes clear that short-term promotions are retail services, and no one has rebutted AT&T's showing that the "retail rates charged to subscribers" are the prices that subscribers actually pay, including any discount, including promotions.

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AT&T REPLY TO OPPOSITIONS AND COMMENTS TO PETITIONS FOR RECONSIDERATION AND CLARIFICATION OF FIRST REPORT AND ORDER

Pursuant to Section 1.429 of the Commission's Rules, AT&T Corp. ("AT&T") hereby replies to the oppositions and comments to the petitions filed for reconsideration and clarification of the Commission's First Report and Order.

I. THE INCUMBENTS' COMMENTS CONFIRM THAT THE COMMISSION MUST CLARIFY ITS PRICING RULES TO DETER EFFORTS TO EVADE ITS CENTRAL MANDATE THAT RATES BE NONDISCRIMINATORY AND REFLECT ECONOMIC COSTS.

The Commission adopted TELRIC-based pricing guidelines because this forward-looking methodology will produce the true economic cost to the incumbent of its unbundled elements and prevent incumbents from imposing discriminatory charges that operate as entry barriers. AT&T's proposed clarifications follow from these same economic principles and would further diminish the incentives and abilities of incumbents to engage in the discrimination that would have the effect of prohibiting some new entrants from offering competing local exchange and exchange access services.

Incumbent LECs have predictably opposed these measures - led by the largest exchange monopolist, GTE, whose exemption from § 271's interexchange services ban means it has nothing to lose by openly seeking to delay or even foreclose local competition. The incumbents raise no legitimate objection to AT&T's TELRIC-based, competitively neutral proposals, but offer only rhetoric and new variations of their familiar claim that they alone must be guaranteed recovery of whatever "actual" historical costs they happen to incur for whatever networks they choose to build.[1] As the Commission, the Department of Justice and others have recognized, that view is fundamentally incompatible with the competitive goals of the Act. That is why the incumbents largely ignore the merits of AT&T's proposals and focus instead on their misguided assertions that the pending appeals and temporary stay divest the Commission of jurisdiction to revisit its pricing rules.

These claim are frivolous. In this regard, the Supreme Court has held that the pendency of such appeals has no effect on the Commission's authority to refine its rules or even to develop alternative legal justifications for them. See, e.g., American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 541 (1970). And it is vitally important that the Commission do so here, for the record now overwhelmingly demonstrates that, if left unchecked, incumbents will use "nonrecurring" and other charges to erect insurmountable barriers to entry and competition. See, e.g., AT&T Petition, pp. 6-29 (cataloguing abuses); GTE, p. 15 (states and the Commission should "leave the recovery of non-recurring costs to the discretion of telephone companies").

Nor is there any basis for the incumbents' more general claims that the Commission lacks any authority to adopt (or refine) TELRIC-based pricing guidelines. Indeed, quite apart from the provisions of § 251 which the Eighth Circuit has provisionally (and in AT&T's view erroneously) concluded may not authorize such rules, the Commission can and should now

[1] See, e.g., U S WEST, p. ii (TELRIC methodology is itself "unlawful and arbitrary"); GTE, p. 8 ("the petitioners' pricing proposals would not allow ILECs to recover their actual costs").

adopt two additional jurisdictional bases for these rules - each of which is legally unassailable. Indeed, the appropriateness of this action is confirmed by the arbitration decisions issued to date, for they demonstrate that even while stayed, the Commission's pricing rules - which by any account represent the most comprehensive (and, in many cases, the only) treatment of the relevant pricing issues - have been, and will continue to be, highly influential in the state proceedings that will ultimately determine whether incumbents succeed in their efforts to protect their monopolies.[2] The Commission has both authority and good cause to complete what it began and to develop the national pricing guidelines that will promote efficient competition while preserving state authority to determine specific prices.

A. The Commission Has Ample Jurisdiction To Act On AT&T's Pro-Competitive Pricing Proposals.

In an obvious effort to divert attention from the merits of proposals that would lower barriers to entry and foster efficient local exchange competition, GTE and other incumbents claim that the pendency of petitions to review the First Report And Order in the United States Court of Appeals for the Eighth Circuit and that court's temporary stay order deprive the Commission of "authority to consider the petitioners' proposals for additional pricing rules without court approval" (GTE, pp. 6-7). To the contrary, it is well-settled that "[i]n multiparty proceedings, such as the present one, some may seek judicial review and others may seek administrative reconsideration." American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 541 (1970). The "concept 'of an indivisible jurisdiction which must be all in one tribunal or all in the other may fit' some statutory schemes," id. (internal citation omitted), "but not that of the Communications Act."

2 See, e.g., Judgment of the Arbitrator, In re Petition of AT&T Communications of New Jersey, Inc. For Arbitration With Bell Atlantic, Docket No. T096070519 at 7 (Nov. 8, 1996) ("it is clear the rate should be based upon total element long run incremental cost").

Wrather-Alvarez Broadcasting, Inc. v. FCC, 248 F.2d 646, 649 (D.C. Cir. 1957). That is true regardless of the existence of a temporary stay. "Since by the Act the Commission never lost jurisdiction to pass on petitions for rehearing" once petitions for review were filed, "and since the stay order did not forbid it from acting on those pending petitions, it [is] not necessary for the Commission to seek permission of the court to make [the proposed] rulings." American Farm Lines, 397 U.S. at 542.

GTE and others also repeat here the more general attacks on the Commission's jurisdiction to interpret the Act's pricing provisions that they have made in the Eighth Circuit. But as both the Commission and AT&T have argued there, the Act unquestionably vests the Commission with authority to promulgate pricing rules. Section 251 both requires incumbent LECs to charge "just, reasonable, and nondiscriminatory" rates for unbundled elements and interconnections (47 U.S.C. § 251(c)(2)) and requires the Commission "to establish regulations to implement the requirements of this section," id. § 251(d)(1). Moreover, the statute elsewhere grants the Commission explicit and unambiguous authority to implement by regulation the requirements of all of Chapter 5 of Title 47 (entitled "Wire and Radio Communication"), including §§ 251 and 252.[3]

Further, even if these direct grants of authority were somehow insufficient to confer jurisdiction on the Commission to issue the proposed pricing rules for jurisdictionally intrastate services - which is all that the Eighth Circuit provisionally held in its stay decision - there are

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[3] See 47 U.S.C. § 154(i) ("Commission may . . . make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary to carry out its functions"); id. § 201(b) ("Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter") (emphasis added); id. § 303(r) ("Commission . . . shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act"). See also 110 Stat. 61 (1996) (inserting §§ 251 and 252 within chapter 5).

two other jurisdictional bases for the pricing rules that are legally unassailable. By expressly relying on these alternative grounds now, the Commission can assure that its procompetitive standards will continue to operate.

First, the Commission can and should hold that ILECs' provision of unbundled elements and interconnections that is prescribed by § 251(c)(2) and § 251(c)(3) are not purely intrastate matters within the states' exclusive jurisdiction, but rather are facilities inseverably used to provide interstate services over which § 2(a) of the Act independently gives the Commission jurisdiction. In particular, network elements and interconnections are not services, but are facilities that are provided by one carrier (an incumbent LEC) to another carrier (a competitive LEC) so that they can inseverably be used in the provision of both exchange service (a jurisdictionally intrastate service) and exchange access (a jurisdictionally interstate service). Courts have long held that § 2(a) gives the Commission jurisdiction over such subjects where there is no basis to separate them into interstate and intrastate components[4] – as there concededly is not here.[5] That is starkly confirmed by the fact that the tentative

[4] See Louisiana PSC v. FCC, 476 U.S. 355, 375-76 n.4 (1986); California v. FCC, 39 F.3d 919, 931-33 (9th Cir. 1994); PUC of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1990).

[5] Sections 251 and 252 provide for a single charge for unbundled elements and interconnections. Indeed, because an incumbent LEC cannot know whether or to what extent a facility will be used to provide interstate as compared to intrastate services, there is no basis (statutory or otherwise) to separate the charge into interstate and intrastate components that could be separately regulated by state and federal authorities. See, e.g., First Report and Order, ¶ 357 (unbundled loop purchaser, "as a practical matter, will have to provide whatever services are requested by the customers to whom the loops are dedicated"); Order on Reconsideration, ¶ 11 ("the carrier that purchases the local switching element is likely to provide all available services requested by the customer served by that switching element").

contrary holding of the Eighth Circuit would give the states direct authority over jurisdictionally interstate services.[6]

Second, § 253 of the Act, entitled "Removal of Barriers to Entry," provides an independent legal basis for the Commission's TELRIC pricing guidelines. Section 253 authorizes the Commission to invalidate any state requirement that has the "effect" of prohibiting "any entity" from offering "any interstate or intrastate service." 47 U.S.C. § 253 (1996) (emphasis added). Because § 253 expressly applies to intrastate services, there is no substance to any claim (e.g., Bell Atlantic, p. 2) that the rule of construction of § 2(b) of the 1934 Act could limit the application of § 253 solely to interstate services.[7]

Nor can there be any serious claim that § 253 does not apply to requirements that determine the prices that incumbents charge their competitors. Section 253 applies by its clear terms to "any statute, regulation, or legal requirement" that operates as a barrier to entry. § 253(d) (emphasis added). The imposition of inflated and/or discriminatory prices for essential inputs is a classic entry barrier that falls within any possible construction of § 253's plain terms. As the Commission has explained, "[t]he price levels set by state commissions will determine whether the 1996 Act is implemented in a manner that is pro-competitor and favors one party . . . or . . . pro-competition." First Report And Order, ¶ 618. If, as some incumbents have proposed, states could through arbitration orders or otherwise require new entrants alone to bear the one-time costs associated with developing gateway and direct routing capabilities, or to pay for "network

[6] In particular some of the rules that the Eighth Circuit stayed preclude the incumbents from assessing interstate access charges on the ground that the same costs are already recovered in part in the single charge the incumbent makes for use of the unbundled element. See 47 CFR § 51.515; First Report and Order, ¶¶ 721-23.

[7] See, e.g., Louisiana PSC v. FCC, 476 U.S. 355, 377 (1986).

upgrades" or other activities that an incumbent will undertake only because it does not currently employ efficient technology or practices, the clear "effect" of such a requirement would be to "prohibit . . . the ability of any entity to provide" competitive local service. See § 253(a).

Section 253(d) expressly authorizes the Commission to enforce its provisions in after-the-fact adjudications that preempt any state order allowing inflated or discriminatory non-recurring or other charges that operate as entry barriers. Correlatively, Sections 4(1), 201(b), and 303(r) give the Commission authority to issue regulations in advance that generically define the rules and principles that it will apply in such adjudications in determining whether state orders are unlawful entry barriers. See, e.g., FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

In sum, the Commission has undoubted authority to act now with respect to the pricing clarifications that AT&T and others have proposed. Further, there is every reason to believe both that the Commission's pricing authority and all of its pricing rules will ultimately be upheld, and that those rules, as clarified here, will continue to play an extremely valuable and positive role in guiding the states and the parties, regardless whether they are binding during the pendency of appeals.

B. AT&T's Nondiscriminatory, Competitively Neutral Pricing Proposals Are Consistent With The Act And Reflect The Same Established Economic Principles Upon Which The Commission Based Its Pricing Rules In The First Report And Order.

Each clarification that AT&T seeks is grounded in one or both of two fundamental economic principles: (1) incumbents' charges for the essential inputs that the Act requires them to provide to new entrants should reflect only forward-looking economic costs, and (2) those charges should be determined and assessed on a nondiscriminatory, competitively neutral basis. Because those same two principles are the touchstone for the Commission's entire

TELRIC pricing scheme, the incumbents' principal objections to AT&T's non-recurring charge and other proposals quickly degenerate into the same baseless arguments raised in opposition to TELRIC pricing and properly rejected in the First Report and Order. In this regard, no provision of the Constitution or the Act remotely entitles incumbents to guaranteed recovery of their "actual" – i.e., embedded – costs. See First Report and Order, ¶ 706 ("regulation does not and should not guarantee full recovery of their embedded costs"); id., ¶ 733 (rejecting takings claims). And rates that favor incumbents over new entrants are no less in violation of the Act's nondiscrimination requirement than rates that favor one new entrant over another. See id., ¶ 218 ("the term 'nondiscriminatory,' as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself"). The incumbents' more specific objections are equally meritless.

Non-Recurring Charges. Focusing on actual incumbent non-recurring charge practices and proposals, AT&T proposed a series of clarifications designed to help ensure that rates are nondiscriminatory and competitively neutral so that incumbents cannot target new entrants for "one-time" or "transactional" non-recurring or other charges that are both inconsistent with TELRIC-based pricing and that have the effect of prohibiting competition. The incumbents' comments confirm the clear need for pricing rules that specifically address these non-recurring charges.[8] The intensity of the incumbents' rhetoric on these issues also is evidence that they

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[8] See, e.g., Pacific, pp. 11-12, n.28 (defending resale service order charge of $50); id., pp. 9-10 (claiming that new entrants should be saddled with one-time "implementation" charges of $55 million in 1996 alone); GTE, p. 17 (claiming that GTE alone "will incur substantially more than $50 million in costs associated with one-time work efforts"); id., p. 16 (pricing rules must address "network re-engineering" costs); Ameritech, p. 21 (new entrants should pay incumbents' "costs of upgrading their networks"). See also US One, p. 7 (citing

(footnote continued on following page)

view excessive or discriminatory non-recurring charges as an especially effective tool to bar local entry and are concerned that AT&T's proposals would effectively constrain such abuses.

First, AT&T requests that the Commission clarify that "one-time" costs associated with "gateways" and other aspects of an efficient multiple carrier network must, like "one-time" costs associated with loops and switches, be recovered over the lives of those assets and from all carriers - including incumbents - in proportion to their relative use. See AT&T Petition, pp. 11-15. Incumbents do not deny that this is the only rule consistent with competitive neutrality, but nonetheless claim that the Act forbids it because the words "competitively neutral" do not appear in either Section 251(c) or Section 252(d). See, e.g., Pacific, p. 10. But the word "nondiscriminatory" appears in both sections, and charges that apply to new entrants but not incumbents would plainly be discriminatory. Incumbent claims that properly spreading one-time costs across all demand (including their own) would violate principles of cost causation, see, e.g., USTA, p. 8, or require incumbents to "subsidize" requesting carriers, id., p. 4, are also baseless. Unbundling and the provision of network elements to multiple carriers are mandated by the Act and thus to the extent there is any "cost causer" with respect to the one-time costs at issue here, that cost causer is Congress for the benefit of all consumers - including those who continue to select service from incumbents. And so long as all carriers are, as AT&T proposes, assessed those costs in proportion to their use of the network, no carrier will subsidize any other, and all carriers, including incumbents, will have

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"financial analyses that indicate that non-recurring charges are one of the primary determinants of whether local entry is profitable or unprofitable").

equal opportunities to recover those costs from the consumer beneficiaries of the new competitive regime.

Second, AT&T requests that the Commission clarify that incumbents may charge only for the forward-looking costs of one-time activities and transactional non-recurring activities that an efficient provider would incur to provide the requested facilities. See AT&T Petition, pp. 16-17. Incumbents complain that this rule would deny them recovery of the costs of "upgrading" currently inefficient facilities to efficient status. That is both a necessary and appropriate outcome of the Commission's forward-looking approach. As GTE recognizes, the only way to avoid this reality – the same reality faced by inefficient firms in competitive markets – is to "resist establishing rules based on hypothetical networks and costs" (GTE, p. 18). To resist doing so, however, is to resist basing prices on forward-looking economic costs and, ultimately, to resist local exchange competition. In this regard, it is important to recognize that it is not the difference between "hypothetical" and "real" networks that GTE and other incumbents fear – after all, the Commission's rules require TELRIC models to take as given the incumbents' existing wire center locations and to estimate costs on the basis of currently available technologies and practices – but the prospect of being held to the competitive market standard of efficiency.

Third, AT&T seeks a rebuttable presumption that the forward-looking cost of any non-recurring activity that can be accomplished largely through software or other electronic means is $5. See AT&T Petition, pp. 18-20. Incumbents complain that $5 is not enough because the operations involved here are different and more costly than the operations that led to a mandatory $5 charge in the PIC change context, see, e.g., NYNEX, pp. 8-9, notwithstanding the Commission's express finding that the two operations can and should be accomplished in the same time intervals.[9] This argument has multiple flaws. Most fundamentally, the incumbents' claims that they can prove higher costs are fully consistent with AT&T's proposal, which seeks only a rebuttable presumption in recognition of the incumbents' asymmetrically superior access to relevant cost information. See ALTS, p. 5 ("The $5.00 provides a 'safe harbor' protecting CLECs, while still permitting ILECs to demonstrate that efficiently-run wholesalers of network services actually do require higher transaction prices").[10] Moreover, although incumbents announce here that cost studies will support higher charges, they do not present a shred of cost evidence that this is so. Certain of the "additional" operations they cite are retail operations that are plainly irrelevant in determining appropriate carrier-to-carrier rates, see NYNEX, p. 8 (rendering consumer's final bill); others reflect "manual updating" notwithstanding that the First Report and Order requires electronic interfaces, see Pacific, p. 12 n.28. By their own admission, the incumbents' claim both understates the nature of activities that occur when customers change long distance providers, see NYNEX, p. 8 n.12 ("PIC changes to lines that involve complex translations . . . are still handled on a manual basis"), and overstates those that will occur when customers change local providers – unlike PIC change requests, local provider changes should in virtually all cases be

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[9] See 47 CFR § 51.319(c)(1)(ii) ("An incumbent LEC shall transfer a customer's local service to a competing carrier within a time period no greater than the interval within which the incumbent LEC currently transfers end users between interexchange carriers, if such transfer requires only a change in the incumbent LEC's software").

[10] No incumbent even responds to AT&T's final non-recurring charge proposal that the Commission establish incumbents' tariffed service order and related charges for retail services as the interim default proxy ceilings for comparable carrier-to-carrier transaction charges. See AT&T Petition, p. 20. And in response to ALTS' proposal that such retail charges become permanent rebuttable presumptions of appropriate carrier-to-carrier charges, incumbents claim without the slightest support that their retail charges do not cover their costs.

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transmitted electronically and often in bulk. See, e.g., Pacific, p. 14 (recognizing that an order for one hundred loops may impose no more costs on an incumbent than an order for a single loop). And the incumbents simply ignore that the only cost evidence in the record – an incremental cost study prepared by NYNEX and an interim customer changeover charge adopted by the California PUC, see AT&T Petition, p. 19 – supports an even lower presumption, and, indeed, that a California arbitrator has subsequently determined that the incumbent should not assess any customer changeover charge.[11]

Operations Support System Cost Recovery. Contrary to the incumbents' protestations, AT&T does not seek to prevent ILECS from recovering forward-looking costs associated with operations support systems. Rather, AT&T proposes only a practical solution – i.e., recovery of those costs through the charges for the network elements that those systems support – that reflects the reality that neither the network element nor the OSS would exist in isolation from the other, and, indeed, that many of the facilities and personnel used to provide the OSS are the same facilities and personnel used to provide the underlying network elements. In this regard, the incumbents do not deny that operations support system costs generally are not reflected in separate ARMIS accounts, which explains why, as they concede, they have "not yet been able" (GTE, p. 21) to separately estimate OSS costs. GTE claims that the AT&T proposal would "uneconomically recover a portion of OSS direct costs from interconnecting

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See Ameritech, p. 23. Again, however, any incumbent that can prove that is so would not be disabled by the rules proposed by either AT&T or ALTS from imposing higher charges.

[11] See Arbitrator's Report, In the Matter of the Petition of AT&T Communications of California, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish An Interconnection Agreement With Pacific Bell, App. 96-08-040 (October 31, 1996).

parties who do not use OSS" (id., p. 20), but fails to explain why an interconnector would choose to rely on inefficient facsimile or telephone-based pre-ordering, ordering, provisioning, repair and maintenance, and billing procedures, rather than the electronic systems that the incumbent itself uses and that it is required to provide by the Act and the First Report and Order.[12] And the appropriate measure, in the event, new entrants do, in limited circumstances, use less efficient procedures - because, for example, the required electronic access to OSS is not available - is for incumbents (in compliance with the Act's nondiscrimination requirement) to discount the otherwise applicable network element rates.

TELRIC Cost Study Inputs. NYNEX and Bell Atlantic urge the Commission to reject AT&T's request that the Commission make clear that TELRIC cost studies should presumptively reflect approved forward-looking projection lives in estimating depreciaiton costs. Economic lives have decreased, they claim, because a new entrant "may choose to use that element for only a short period of time while it deploys facilities of its own" (Bell Atlantic, p. 5). But, as economists have explained, although the Act may increase incumbents' retail risks, it should, if anything, decrease the risk (through the increased demand brought by competition) that their underlying facilities will be underutilized.[13] And, the incumbents themselves claim that TELRIC-based pricing will discourage facilities construction

[12] The incumbents also oppose AT&T's request that the Commission clarify that its interim default proxy ceilings reflect OSS costs and that no additional OSS charges are appropriate when the defaults are used. But the incumbents' asserted justification for rejecting AT&T's proposal in fact supports it - the fact that the state proceedings from which the Commission derived its interim default proxy ceilings did not separately examine OSS costs merely confirms that those states did not perform the detailed and artificial allocations of facilities and personnel costs that would have been necessary to exclude OSS costs from those state studies.

[13] See May 30, 1996 Reply Comments of AT&T, Docket No. 96-98 at App. B, p. 7 (Reply Affidavit of William J. Baumol, Janusz A. Ordover, and Robert D. Willig).

by new entrants and incumbents alike, in which case the risk of underutilization would decrease even further. See, e.g., U S WEST, p. 2. Although it is true that incumbents will face some risk that their facilities will be underutilized, that has always been the case – e.g., Centrex customers have long been free to drop that service and switch to a competing PBX provider - and incumbents are appropriately compensated for that risk through forward-looking regulatory agency approved capital costs.

At least one incumbent also "agrees with the general thrust of AT&T's observations about utilization factors, and fully agrees with AT&T that utilization factors should be reasonable." Sprint, p. 9. Sprint nonetheless opposes AT&T's common sense proposal that incumbents be required to calculate TELRIC-based unit prices either by (a) dividing the cost of a network sized efficiently to serve current demand by that current demand, or (b) dividing the cost of a network sized efficiently to serve some higher level of expected future demand by that expected future demand. See AT&T Petition, pp. 22-24. But Sprint is simply wrong in asserting that AT&T's proposal is unworkable because of the difficulty of determining "how much excess capacity is reasonable given any fixed level of demand" (id., p. 10) – indeed, that is the whole point of giving states the option of basing unit costs on current demand and objective fill factors that reflect only the engineering spare capacity over which there is little dispute. Such unit prices are relatively simple to determine and they are certainly preferable to Sprint's solution of blindly accepting incumbents' embedded utilization factors.[14]

[14] In response to MCI's request that the Commission endorse the Hatfield Model as one permissible method of estimating TELRIC, a number of incumbents address at length supposed technical limitations of the Hatfield Model. As AT&T has demonstrated elsewhere (see Supplemental Comments of AT&T, Docket No. 96-45), and will not repeat here, these claims are baseless.

Geographic Deaveraging. Even incumbents generally agree that "[d]eaveraging of elements into cost related zones is a reasonable concept as it allows rates to reflect the underlying cost differences among areas that the incumbent LEC serves." NYNEX, p. 25. Incumbents nonetheless oppose statewide deaveraging on the ground that it will not "assure" that LECs with higher than average costs recover those costs. See id. As AT&T demonstrated in its Petition (pp. 26-28), however, to the extent these higher than average "costs" reflect true forward-looking geographic cost differences, statewide deaveraging will appropriately capture them. And to the extent the "cost" differences in question are not true forward-looking differences, but reflect merely embedded incumbent "characteristics" (Sprint, p. 12) TELRIC principles preclude assured (or even potential) recovery.[15]

II. THE COMMISSION SHOULD REQUIRE ILECS TO PERMIT COLLOCATION OF REMOTE SWITCH MODULES.

AT&T's Petition (pp. 31-34) showed that CLECs should be permitted to place remote switch modules or optical switch modules (collectively "RSMs") in collocated space because, in the intended configuration, RSMs function as transmission equipment, and because allowing RSMs in collocated space will permit greater efficiencies. Several ILECs, however, oppose AT&T's request on baseless grounds.

For example, Ameritech (p. 32) and other ILECs argue that RSMs are not "necessary" to establish interconnection with an incumbent's network.[16] However, in cases where a CLEC

[15] In response to NECA's petition, AT&T explained that it would be inappropriate to address permanent separations solutions in this proceeding and proposed a workable interim separations measure. See AT&T Comments, n.26. Only Ameritech (p. 29) offered additional comments on this issue, and the lack of clarity of its proposal further confirms that these matters should be addressed elsewhere in a more comprehensive fashion.

[16] See also Bell Atlantic, p. 21; GTE, p. 32; Pacific, pp. 34-35; USTA, pp. 33-34; U S WEST, pp. 20-21.

installs an RSM, the RSM will completely replace the digital loop carrier ("DLC") transmission equipment used to interconnect with the ILEC for the customers served by the RSM, making the RSM "necessary" in such configurations.[17] The fact that a CLEC could use a different piece of equipment to achieve interconnection cannot be dispositive in such circumstances, especially when the RSMs will be used primarily to perform the functions performed by traditional transmission gear and, as AT&T showed (Petition, pp. 32-33), there are legitimate circumstances in which the use of RSMs is more efficient and cost-effective.[18] Moreover, RSMs will not require any more space than the multiple DLC units they would replace.[19] Thus, ILECs should not be empowered to dictate the types of equipment CLECs may use to interconnect, and thereby raise CLECs' costs, unless the ILEC can prove under the

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[17] As AT&T's Petition (n.23) showed, RSMs will physically "access" and "interconnect" with the ILEC's unbundled network elements in exactly the same way as DLC equipment in collocated space. Thus, NYNEX (p. 15) is simply wrong that the use of RSMs "does not completely eliminate the need to install transmission equipment." Once a customer is interconnected to a CLEC's network using an RSM, there is no need for the CLEC to use other transmission equipment in its collocated space to interconnect with the ILEC for that customer.

[18] See also US One, p. 11 (prohibiting CLECs from collocating RSMs results in "suboptimal CLEC network designs"). Further, if CLECs are not permitted to collocate and use RSMs for the minority of calls that would call upon the RSM's switching capabilities, they would face substantially increased costs inefficiencies. In order to serve two customers who reside next door to each other, the CLEC would be required to route traffic from the calling party to the ILEC's switch, through its collocated space to its own separately located switch, back again to the collocated space and then out to the called party. ILEC efforts to exclude such uses would clearly be an unreasonable condition of a CLEC's use of collocated space (see AT&T Petition, n.24).

[19] Cost considerations preclude CLECs from seeking to collocate an RSM to replace a single DLC unit. Rather, RSMs would be used to replace several such units.

Commission's existing standards that such interconnections are not technically feasible or threaten the ILEC's network reliability.[20]

III. DARK FIBER IS INCLUDED WITHIN THE EXISTING NETWORK ELEMENTS.

Several commenters support AT&T's request (Petition, pp. 35-37) that dark fiber should be made available to competitive carriers because, except for electronics, dark fiber is identical to other ILEC optical transmission facilities used to provide transport and loop functions.[21] Indeed, the effect of a decision not to require access to fiber without electronics (i.e., dark fiber) is to impose the kind of bundling requirement that Section 251(c)(3) was intended to eliminate.

The ILECs predictably oppose this request, resting their argument on the assertion that dark fiber is not "used" in the provision of telecommunications services.[22] US One recognizes (p. 4), however, "defin[ing] whether [a] facility is a 'network element' - and hence a CLEC's right to access that facility - based solely on what the facility is connected to at a particular point in time, would not only be grossly anticompetitive, but would lead to nonsensical circular results." Moreover, US One (p. 5) correctly states that "[i]t would strain credulity if LECs could simultaneously and successfully argue that dark fiber (i.e., optical transmission

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[20] NYNEX's claims (p. 16) regarding the "technical implications" of collocating RSMs are also unfounded. The power and grounding requirements of RSMs are no different from the requirements of ILEC equipment elsewhere in the central office, and the CLEC will compensate the ILEC for making any necessary arrangements in the collocated space.

[21] E.g., MCI Petition, pp. 20-23; US One, pp. 2-6. It is necessary that the Commission act on this issue, because some states have refused to require ILECs to provide access to dark fiber simply because such access is not mandated in the Interconnection Order or existing state law, and without applying the 1996 Act's (or the Interconnection Order's) standards defining network elements. Arbitrator's Report, AT&T-CA/GTE-CA Arbitration, at 3, Application 96-08-041 (Cal. PUC, October 31, 1996) ("AT&T/GTE Cal. Arbitration").

[22] E.g., Bell Atlantic, p. 19; BellSouth, p. 3; GTE, pp. 28-29; Pacific, p. 27; USTA, p. 22.

facilities) are not used in the provision of telecommunications service, while at the same time allowing such facilities to be included in subscriber rates for telecommunications services."

Although it opposes AT&T's request, NYNEX in fact proves that dark fiber is fungible with "lit" fiber and can be used at will by the ILEC when it states (p. 17) that "when some or all of a cable is cut, NYNEX has the ability to utilize unlit fiber pairs to restore network services by physically patching the terminal equipment to spare pairs." Accordingly, contrary to USTA's claim (p. 23), dark fiber is not like "a spool of fiber cable standing in a LEC's equipment yard," nor is it spare equipment stored in a warehouse. Rather, dark fiber is installed transmission facilities that are awaiting use whenever the ILEC chooses. There is no principled reason why CLECs should not have the same right to use these facilities as the ILEC.

Moreover, AT&T's requests for dark fiber would not leave ILECs with any "stranded" facilities.[23] AT&T only seeks to enter and exit ILEC fiber cables at logical splicing points (i.e., junction points at which splicing is technically feasible for the ILEC itself), and it will purchase the use of entire fiber strands between such points. No ILEC facilities would be "stranded" in such case, because the ILEC retains the ability to use all of the remaining capacity in this otherwise idle portion of the installed cable.[24] Further, AT&T does not oppose

[23] Any claim regarding "stranded" facilities is founded on economic issues, not technical infeasibility, which is the standard for determining whether elements must be unbundled.

[24] NYNEX's "operational" claims (pp. 17-18) boil down to the simple assertion that ILECs would have to treat dark fiber in the same manner as any other unbundled element, with no proof (or even assertion) that it would be technically infeasible to do so. These claims must therefore be rejected. Moreover, if a CLEC places its own electronics on ILEC dark fibers, it is the CLEC's responsibility to test such fibers and to inform the ILEC of service or maintenance problems.

the right of an ILEC to use dark fiber for specific and identified projects that are expected to be completed within a reasonable period.[25] ILECs should not, however, be permitted to withhold dark fiber from competitors solely on the basis of generalized "planning" that likely incorporates customer demand that would, in a competitive environment, be fulfilled by other carriers.[26] This argument does not apply to any other unbundled elements (e.g., excess installed switching capacity), and it should not apply to dark fiber.

IV. ILECS MUST OFFER SHORT-TERM PROMOTIONS FOR RESALE.

AT&T and MCI requested the Commission to reconsider the exclusion of so-called "short-term" promotions from the ILECs' obligation to offer to other carriers all retail services at wholesale rates. As they and other CLECs demonstrated, this exclusion is contrary to the plain language of Section 251(c)(4) and its goal of creating genuine resale competition.[27] The ILEC oppositions not only attempt to preserve this exclusion, but seek to expand it to cover all non-standard services, including customer-specific offerings and trials.[28] Indeed, GTE (p. 35), which can and does offer packages of local, long distance and other services and thus has no incentive to open its market, states that it intends to prevent resale by inserting and enforcing restrictive conditions in its tariffs. These oppositions are meritless, and underscore the need for the Commission to completely and decisively close all loopholes to the basic statutory

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[25] See Pacific, p. 27.

[26] See GTE, p. 29. AT&T also does not oppose an ILEC's designation of a reasonable portion of a cable's dark fiber for restoration purposes, provided that such fiber may be used by any carrier for such purposes, not just the ILEC itself (see NYNEX, p. 17). In a truly competitive environment, no single carrier would have an obligation to serve all customers.

[27] AT&T Petition, pp. 29-31; MCI Petition, pp. 8-9; Sprint, pp. 18-19; WorldCom, pp. 23-24; GCI, pp. 8-9.

[28] GTE, pp. 33-34; Pacific, pp. 28-30; SNET, pp. 4-7.

requirement that all telecommunications services provided by ILECs be made available for resale at wholesale rates.

In particular, as AT&T demonstrated, ILEC claims that "promotional" offerings are not provided at retail misreads the statutory language. Contrary to NYNEX's claims (p. 9), the Commission did not and could not find that promotional offerings are not services provided at retail to end users. Indeed, the First Report and Order (¶ 951) expressly holds that "[i]f a service is sold to end users, it is a retail service." No commenter, moreover, has rebutted AT&T's showing that the "retail rates charged to subscribers" are the prices that subscribers actually pay, including any discount, including promotions.[29]

Respectfully submitted,

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[29] The ILECs' proposed exclusion of customer-specific, trial and other discounted offerings based on the fact that the statute prohibits only "unreasonable" conditions or limitations is similarly flawed. As the Commission correctly concluded, this proposal would not merely condition or limit resale of the offering, but would "exempt" resale entirely, and "thereby eviscerat[e] the resale provisions of the 1996 Act." First Report and Order, ¶ 948. In all events, the Commission has stated that any conditions and limitations affecting resale are presumptively unreasonable and must be "narrowly tailored," and that this applies to tariffed terms and conditions no less than to resale agreements. See First Report and Order, ¶ 939. For these reasons, GTE's (p. 35) suggestion that it may use tariffed restrictions to defeat resale because "resellers must take the tariff the ILEC offers" is baseless.

CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 14th day of November, 1996, a copy of the foregoing "AT&T Reply to Oppositions and Comments to Petitions for Reconsideration and Clarification of First Report and Order" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached Service List.

Ann Marie Abrahamson